Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS ON NOTICE OF PROPOSED RULEMAKING BY THE MAINE PUBLIC UTILITIES COMMISSION AND THE VERMONT PUBLIC SERVICE BOARD

INTRODUCTION AND SUMMARY

The Maine Public Utilities Commission ("Maine") and the Vermont Public Service Board ("Vermont") are pleased to file initial comments on the questions raised in the Commission's Further Notice of Proposed Rulemaking (FNPRM) (FCC 05-33) released on March 3, 2005. The Notice requests comments on various issues and proposals involving intercarrier compensation.

Maine and Vermont generally support the NARUC Task Force proposal for intercarrier compensation reform (Version #7) with the alternative requiring the payment of originating compensation to the local exchange carrier. We are concerned that the absence of originating compensation charges may cause arbitrage and diminish special access revenue for ILECs.

Although we substantively advocate a "unified" compensation plan with the same compensation amounts applied to inter and intrastate traffic, we do not believe the Commission has the authority to mandate a unified plan without state commission agreement. Therefore, a voluntary plan such as that proposed by the NARUC Task Force is the only lawful way to expeditiously achieve a unified intercarrier compensation scheme without protracted litigation.

The Intercarrier Compensation Forum (ICF), a group of nine carriers, has proposed a method of resolving Intercarrier compensation issues that requires the Commission to preempt state commissions as to intrastate access rates. The ICF proposal is fundamentally flawed because the Commission lacks jurisdiction to implement it. The proponents of the ICF proposal suggested several legal arguments to support FCC preemption of intrastate access. None of those arguments is valid.

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I. THE COMMISSION SHOULD ACT IN CONFORMANCE WITH THE NARUC PRINCIPLES.

The NARUC principles submitted in this proceeding in March should be carefully considered by the Commission. Maine and Vermont wish to draw the Commission's attention to the importance of one particular provision.

Provision III.B provides that "[i]ntercarrier compensation should be designed to recover an appropriate portion of the requested carrier's applicable network costs." This principle is of enormous strategic importance to states, like Maine and Vermont, that have a high proportion of long rural loops, small exchanges, and significant transport costs. These exchanges inevitably impose a high per-customer cost on any carrier who seeks to provide service. Any Commission policy that defines away the costs for these exchanges, or that greatly reduces intercarrier revenues, inevitably risks overburdening the customers who are served by these exchanges as well as state and federal universal service funds. This would likely increase the difficulty of providing sufficient state and federal universal service support.

The Commission should reject "bill and keep" as a means of intercarrier compensation design. Instead, the commission should allocate a share of the costs of terminating incoming traffic to intercarrier charges that fairly reflects the value of interconnection to the whole network. Since every carrier benefits from interconnection to a ubiquitous network, every carrier should contribute to keeping that network ubiquitous. There is nothing economically irrational when Customer A seeks to communicate with Customer B, in requiring A to make a reasonable contribution toward the cost of maintaining B's local network.[1] Such reciprocal obligations are common in virtually all other networked services, such as shipping and package delivery.

Maintaining a reasonable contribution from connecting carriers is critical for rural areas, and it is a strategy that the Commission should welcome. The alternative is a bloated universal service program and the risk that local rates increase dramatically in very rural areas.

II. THE COMMISSION DOES NOT HAVE AUTHORITY TO SET INTRASTATE ACCESS RATES.

In the FNPRM the Commission notes that under the current rules, the rate for intercarrier compensation depends on three factors: (1) the type of traffic at issue; (2) the types of carriers involved; and (3) the end points of the communication. Vermont and Maine agree that these facts create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions. In trying to create a rational compensation scheme, the Commission must limit its own actions to the scope of its own authority, and it does not have authority to preempt state jurisdiction over intrastate access.

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[1] When the direction of the call is reversed, of course the compensation flow is reversed.

A. Section 152(b) reserves jurisdiction to the states over intrastate access.

Section 152(b) of Title 47, read together with other sections of the Communications Act of 1934,[2] specifically reserves State authority over intrastate access charge regimes. This is an explicit saving clause that unambiguously preserves state jurisdiction. Section 152(b) states:

> nothing in this Chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . ."[3]

Exceptions to this reservation of authority must be express.[4] No other statutory provision provides the FCC with the authority to preempt State access charge regimes.

The FNPRM suggests that there may be some statutory basis for preemption necessary to implement the ICF proposal. There is none. Previous Commission attempts to achieve a policy goal by means of an unsupported reading of other statutory provisions to expand the agency's preemptive authority have been rejected by the United States Supreme Court. In *Louisiana PSC*, the Supreme Court

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[2] For example, 47 USC § 251(d)(3) (1996) "Preservation of State Access Regulation: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section; and (c) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

[3] 47 USC § 152(b) (1996).

[4] Pub.L. 104-104, Title VI, § 601, appearing in note following 47 USC § 152 (1996) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state or local law unless expressly so provided in such Act or amendments.")

overturned the FCC's attempt to preempt state jurisdiction with respect to the establishment of state depreciation rates of common carriers.[5] The Court rejected the argument that "the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."[6] Accordingly, the Commission should reject the ICF proposal as exceeding its authority and adopt a cooperative federalist proposal such as that submitted by NARUC.

B. Authority to preempt under section 201(b) applies only to those matters to which the 1996 Act applies.

The ICF asserts that the Commission has been given broad rulemaking authority under section 201(b) of the Act which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[7] The ICF then states that the Supreme Court, in *Iowa Utilities Board*, recognized that section 201(b) authority extends not just to jurisdictionally interstate matters, but "encompass[es] matters that, before 1996, fell within the exclusive jurisdiction of the states."[8] The ICF argues that the Commission's rulemaking authority under section 201(b), taken together with the language of section 251(b)(5), demonstrate that the Commission can and should

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[5] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

[6] Id. at 374.

[7] 47 USC § 201(b).

[8] ICF Ex Parte Brief at 28-29 (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-86 (1999)).

preempt the states for all matters of intercarrier compensation, including those matters that involve intrastate access charges for intrastate interexchange calls. This argument fails because 251(b)(5) does not apply to access.

The Commission's authority to preempt the States under section 201(b) falls only to those matters to which the 1996 Act applies,[9] and the Act did not change jurisdiction over intrastate access charges. Consequently, "[i]nsofar as Congress has remained silent, section 152(b) continues to function."[10]

C. Section 251(b)(5) does not provide a basis for preemption because it only applies to the exchange of local traffic.

Some parties have indicated that Section 251(b)(5), which deals with "reciprocal compensation," may provide a basis for federal preemption of intrastate access. That is incorrect. Section 251(b)(5) does not have anything to do with intrastate access.

Any assertion that Section 251(b)(5) applies to all telecommunications "on its face" is inconsistent with both existing precedent and Congressional intent. Section 251(b) specifies interconnection requirements applicable to local exchange carriers in competitive local markets. Subdivision (b)(5) specifically addresses the LEC duty to transport and terminate the traffic of other LECs competing in the *same local exchange service area*. It makes no reference, and has no applicability to interstate or intrastate exchange access services. LECs have never established

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[9] *AT&T Corp. v. Iowa Utilities, Board*, 505 U.S. 366, 380-381 (1999).

[10] *Id.* At p. 381.

"reciprocal compensation arrangements" with *interexchange* carriers. Indeed, Congress specifically distinguished exchange access services from the "reciprocal compensation" transport and termination arrangement required pursuant to Section 251(b)(5), while specifying that new competitive LECs could utilize the facilities and equipment of incumbent local exchange carrier "for the transmission and routing of telephone exchange service and exchange access."[11]

Section 251(b)'s provisions concerning "reciprocal compensation" simply do not apply to "all telecommunications." The express text of the statute, its legislative history, prevailing Court interpretations of § 251(b)(5) and the FCC's own orders clearly indicate that Sec. 251(b)(5) has nothing to do with access charges. The law could not have been stated any more clearly that it was in 1996 in the Commission's own *Local Competition First Report and Order:*

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic. . . . We conclude that section 251(b)(5) reciprocal compensation obligations

[11] 47 USC § 251(c)(2)(A). The Senate bill, which established a new Section 251, imposed duties on local exchange carriers "to negotiate in good faith and to provide interconnection with other telecommunications carriers that have requested interconnection for the purpose of providing telephone exchange service or exchange access service."[11] Legislative history of the Senate bill states: "the obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules." The House and Senate Conference report reached an agreement that establishes a new model for interconnection that incorporates provisions from both the Senate bill and House amendment in a new section 251 of the Communications Act.

> should apply only to traffic that originates and terminates within a local area . . . .[12]

Section 251(b)(5) cannot provide any basis for the FCC to preempt State jurisdiction over intrastate access charges.[13]

D. Section 160 does not provide the FCC with authority to set intrastate intercarrier compensation rates.

Some parties have suggested that 47 U.S.C. § 160, the "Forbearance Power," would allow the Commission to preempt intrastate access rates. This is incorrect. Section 160 only allows the FCC to forbear from applying a specific section of the statute that otherwise requires action. Section 160 states:

> the commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the commission determines that…

The FCC may not "forbear" from applying jurisdiction that it does not have in the first place.

Section 160(e) specifies that "a state commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section." This section is clear. When the FCC forbears from applying authority given to it by the act, the states are similarly barred. Congress clearly did not intend to preempt state economic

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[12] *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996*, CC Docket No. 96-98, First Report and Order,11 FCC Rcd. 15499, FCC 96-325, ¶s 1033-34.

[13] Id., p. 123.

oversight of dominant LECs and rate design elements associated with intrastate retail rates. Intrastate access charges are an integral part of intrastate rate design, and they are not subject to preemption under section 160. Any other conclusion would allow the FCC to obviate any state economic regulation and effectively write 47 U.S.C. § 152(b) out of The Telecommunications Act.

E. Section 251(g) provides no basis for preempting intrastate access service.

Paragraph 79 of the FNPRM suggests that Section 251(g) might provide a basis for preemption of intrastate access charges. The NPRM cites the FCC's *Local Competition First Report and Order,* where the Commission found that section 251(g) creates a "carve-out" from section 251(b)(5) for access traffic, including intrastate access services.[14] The NPRM suggests that the Commission may reverse or modify this conclusion under section 251(g). This reasoning, however, is flawed.

The portion of the *Local Competition First Report and Order* referenced in the FNPRM does not support FCC authority to supersede state jurisdiction over intrastate access. Section 251(g) on its face has nothing to do with establishing Commission authority to change the access charge mechanism. The Commission has always had the authority to establish terms and conditions with respect to

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[14] The NPRM states "[m]oreover, although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." Id., citing Local Competition First Report and Order, 11 FCC Rcd at 15869, para. 732.

interstate access, but it has never had the authority to impose terms and conditions on intrastate access. Section 251(g) does not provide that authority.

The text of Section 251(g) clearly demonstrates that Section 251(g) was primarily intended to protect interexchange carriers from suffering from reduced exchange access. The statute clearly states that the status quo as to exchange access and equal access was to continue until the FCC might lift those obligations. The legislative history makes clear that this subsection was particularly intended to clarify that the RBOCs and GTE should not be permitted to utilize the prospective termination of the AT&T Consent Decree as an excuse to stop providing "equal access and nondiscrimination to interexchange carriers and information service providers."[15] Nothing in this text or history suggests that section 251(g) removes the states' jurisdiction over intrastate access payments.

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[15] The Conference Committee Report for the 1996 Act stated as follows. "The approach of both the Senate bill and the House amendment assumed that Bell Operating Companies ("BOCs") would be required to continue to provide equal access and nondiscrimination to interexchange carriers and information service providers under those parts of the AT&T Consent Decree that would have remained in effect under either approach. Because the new approach completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place. By the same token, although not specifically addressed in either the Senate bill or the House amendment, some provision is also needed to ensure that the GTE Operating Companies that provide local exchange services continue to provide equal access and nondiscrimination to interexchange carriers and information service providers. Accordingly, the conference agreement includes a new section 251(g). . . .When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding so that there is no confusion as to what restrictions and obligations remain in effect. These interim restrictions and obligations shall be enforceable in the same manner as Commission regulations." H.R. CONF. REP. 104-458, p. 122. See also pp. 122-123.

F. The FCC cannot assert jurisdiction over intrastate interexchange access service on the basis of the "Mixed-Use" doctrine.

The FNPRM seeks comment regarding whether the Commission could reform intrastate access charges by invoking the "mixed use" doctrine. Under that doctrine, the FCC may treat traffic as jurisdictionally interstate if it is impossible or impractical to separate its interstate and intrastate components.[16] Those circumstances do not exist here. The record and history conclusively demonstrate that it is neither impossible nor impractical to separate the interstate and intrastate usage of interexchange interconnection services.

Carriers have separately identified intrastate and interstate access services since the inception of access charges, and even before that time for ENFIA. Where administrative or economic factors have dissuaded carriers from separating traffic, imputed usage factors are applied on a mutually agreeable basis subject to practice and procedures set forth in lawfully effective tariffs. The use of VOIP or a CMRS carrier to transmit information does not alter the fact that the traffic can be separately identified. Even if administrative and economic considerations render it difficult for carriers to apply actual measurement,[17] that cannot justify preemption of the state jurisdiction.

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[16] FNPRM at para. 80.

[17] Interconnection agreements between CMRS providers and LECs regularly establish "safe harbor" traffic factors by mutual agreement.

III. CARRIERS PROVIDING EQUAL ACCESS SHOULD RECEIVE COMPENSATION FOR THAT SERVICE

Despite their common origins and the similarity of their names, originating access and terminating access address fundamentally different legal and practical situations. The Commission need not prescribe the same rules for them both.

Terminating access payments arise from the nature of networks. All networks, whether shipping, railroads, electricity or telecommunications, need to exchange traffic sent by other carriers' customers. Any network requires rules that define standardized interchange conditions and that define compensation for downstream carriers who do not have a direct relationship with the party served. Arriving at fair compensation for downstream carriers is of mutual benefit to all carriers because any carrier can require terminating access from any other carrier. Regulation may be needed to prevent the terminating carrier from collecting monopoly rents. Moreover, combining terminating access with Section 252 interconnection payments to avoid arbitrage makes sense. The terminating access service and the terminating interconnection function are at the very least similar. Except for billing differences, they could be identical.

Originating access payments are a completely different matter. They arise from arrangements that are peculiar to telecommunications and in particular to wireline local exchange carriers. Specifically, originating access payments match the access obligation imposed on LECs. "Equal access" is a unique obligation that regulators impose on wireline local exchange carriers. Under these rules, an IXC may use a wireline LEC's facilities to generate income for the IXC. In essence, the IXC rents functionality on the LEC's facilities in order to provide toll service to retail customers served by the LEC. The LEC is obligated to deliver toll traffic to the IXC's point of presence, but it has no current right to compensation from the retail customer. Compensation is paid, if at all, in the form of originating access.

As far as we are aware, the arrangement is unique to wireline telecommunications. Wireless carriers have not been saddled with any equivalent "equal access" presubscription obligations. To the extent that they impose equal access obligations on wireline carriers, regulators should also provide a just and reasonable amount of compensation.

Compensation is also necessary to maintain competitive neutrality. If wireline LECs are subject to equal access obligations, and if their competitors are not so burdened, and if the burden is not matched by a revenue source, wireline LECs will be competitively disadvantaged. Therefore, all interexchange carriers should continue to pay originating access charges at some level.[18] Unless wireline carriers are compensated justly for this additional obligation, they cannot be expected to compete with other networks that are not similarly burdened. Originating access compensation can end when equal access obligations are eliminated or are applied equally to all carriers.

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[18] Where universal service support is provided to a LEC for lost intercarrier revenue, and if that LEC later changes its market structure, such as by newly offering toll services through an affiliate, it may be necessary to impute access revenues to the LEC from its own affiliate in order to avoid double recovery of access losses.

Respectfully submitted,

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